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No.

Supreme Court, U.S.
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IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1988

Victoria E. Ullmann, Petitioner

v.

Olwine, Connelly, Chase, O'Donnell and Weyher

and Job Taylor III

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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135 pp

QUESTIONS PRESENTED

1. Is Fed. R. Civ. Proc. 11 a strategic tool to be used by litigators regardless of the actual frivolousness of the opponents position and is such tactical use of the rule itself sanctionable? Does it constitute retaliation under 42 USC 2000e et seq. when used tactically by a defendant in a Title VII case?

2. Does a motion under Fed. R. Civ. Proc. 11 constitute a claim the withdrawal of which constitutes consideration to support a settlement agreement, and if so, does this render the rule invalid under the enabling legistation, 28 USC 2072?

3. Is a settlement, which a civil rights plaintiff is induced to enter only due to threats of sanctions by the court, "knowing and voluntary" as required by Alexander v. Gardner-Denver, 315 U. S. 36?

4. Does it create a conflict of interest for an attorney to negotiate a settlement, at the initiation of the court, which would

involve the exchange of a motion for sanctions against the attorney and client for the client's substantive claims?

5. Is a judge or magistrate required to recuse himself from consideration of the validity of a settlement and determination of whether refusal to sign the settlement is sanctionable if the party refusing to sign alleges the settlement is invalid because the agreement was obtained only through judicial intimidation and threats of sanctions?

6. Does 28 USC 1927 authorize the an award of attorney's fees against an attorney/party who makes arguments of first impression, based both in fact and law, consideration of which lengthens or complicates the court proceedings?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Victoria E. Ullmann, petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinions of the district court, (App 1-56) are unreported. The decision of the court of appeals, (App 57) is unreported.

JURISIDICTION

The judgement of the court of appeals (App 57) was entered on September 2, 1988. An order denying petitioner's petition for rehearing with suggestion of rehearing en banc was entered October 21, 1988. (App 73) The juridiction of this court is invoked under 28 USC 1254 (1).

STATUTES INVOLVED

The statutes involved here are 28 USC 455, 28 USC 1927, 28 USC 2072, 42 USC 2000e 2(a)(1) and 42 USC 2000e3 and are set out in the appendix, (p. 75-79):

STATEMENT OF THE CASE

This case was brought under 42 USC 2000e 2 et seq. alleging sexual discrimination, gender harassment and retaliation, as well as pendent contract and tort claims.

Although the matters before the Court concern the validity of the settlement reached during trial, the basis of the underlying cause of action is important since threats of

sanctions under FRCP 11 were made against Ullmann and her trial counsel, Thomas Glasper. It is important to demonstrate that the complaint was not frivolous, since that is the standard for determination of a Fed. R. Civ. P. 11 violation.

However, since this issue was not fairly dealt with in the courts' opinions, consideration of the issues presented here may require a review of a larger part of the record that can be presented in this petition. Petitioner has not yet requested the record be transmitted to this Court since the district court is also presently considering Fed. R. Civ. Pro. 60b. motion in this case. Some references below are to the full record.

Some of the factual statements below, therefore, are by necessity of petitioner's position. Since Fed. R. Civ. Proc. 11 depends on the reasonableness of a parties position, this should not inhibit this Court's review of this case. These facts are contained concisely

in Ullmann Memorandum Contra Defendants' Motion for Summary Judgement (Document 40).

Ullmann was hired as a temporary contractual associate by Job Taylor III to work on a document discovery at NCR headquarters in Dayton, Ohio, in February, 1984. (Doc. 40 p. 26) She was to work on this discovery with four paralegals hired from temporary agencies. (Doc. 44, Decision on Motion for Summary Judgement, Uncontroverted Facts 2-5) She was discharged after being employed for one month.

Ullmann alleged a number circumstances indicative of anti-female animus. For example, Ullmann alleged that Taylor shouted at her for asking intelligent legal questions, shouted at her when she declined to dance with him when he took the discovery group on social outings, and criticized her for not smiling at him. (Doc. 40 p. 28, 35, 37-8) At the time of her discharge, Taylor told Ullmann that he was discharging her because the paralegals did not like her because she "thought she knew more about the law" than

they did. (Doc. 40 p. 38) At this time Ullmann had been a practicing attorney seven years.

The case theory is similar, in part, to Hopkins v. Price Waterhouse, 44 FEP 825, a case presently pending before this court, in that it alleges that determinations that Ullmann could not get along with the paralegals was based on stereoypical attitudes about women.

Ullmann filed this case in March, 1985. Since her financial situation was grim at that point, it was necessary to file forma pauperis. Prior to granting the permission to file forma pauperis, the complaint was reviewed by the District Judge Walter Rice. (Doc. 1)

Olwine responded to the complaint by filing a motion for summary judgement and a motion for sanctions under Fed. R. Civ. Pro. 11. (App 6, Doc. 6) The basis of the summary judgment was that Ullmann was discharged because she did not get along with her co-workers and did less work, and they had more witnesses than she did. They submitted an affidavit from Taylor

essentially denying all of Ullmann's allegations. In other words, they argued that because there was a dispute of facts, they were entitled to summary judgement.(See Doc. 6, Fed. R. Civ. Pro. 56)

The basis of the motion for sanctions was that Ullmann brought the suit only for harassment purposes. (App 9, 21) They alleged that this was the case because Ullmann had sued a previous employer, (Ullmann vs. Grandjean and Legal Aid Society of Dayton, Inc., hereafter "legal aid case") (See e.g, App 31) The case was and is pending before Judge Rice.

Bad motive could also be found, they alleged, because she tried several times to settle the case before filing the suit. Olwine argued because in these requests for settlement she urged them to consider settlement because of the cost to Olwine of defending a suit in Dayton, and because she expressed anger and hostility at her treatment

by Taylor, and at other times tried to explain to him why his behavior was improper, this constituted proof of bad motive. (See App 9, 21) Although Ullmann is continually assailed by the magistrate and Olwine about these letters, that fact that they are protected opposition under 42 USC 2000e3 is completely ignored by the magistrate.

Ullmann had tried several times to settle this case prior to litigation. (See Doc. 40, 39-42) A prior exchange between Ullmann and Taylor was alleged to be an effective release, and this was an issue in the case. However, it was determined that this release was obtained through retaliation and was not a major issue at trial. (See App p. 13, but the Magistrate neglects to note here that $1200 of the $1500 in issue was promised severance pay to Ullmann he determined was withheld in retaliation when the issue was considered on summary judgement See Doc 44 p. 24-5, and he indicated her understanding of this finding was correct when

she questioned him during her testimony at trial) Because of the de minimus value of Olwine's claim regarding this release, it should not inhibit this court from determining the consideration issues presented in the petition.

Judge Rice referred this case to Magistrate Michael Merz and both parties consented to full magistrate jurisdiction.

In his ruling on the motion for summary judgement, Magistrate Merz dismissed most of Ullmann's claims. (Doc. 44) His dismissed the direct evidence of discriminatory motive (that Ullmann thought she knew more about the law than a paralegal) by finding that it was probably indicative of "anti-attorney animus" not anti-female animus. (Doc. 44 p. 18)) He dismissed Taylor's statement that just because he hires women does mean he is not a male chauvinist, by finding that this was no evidence of discrimination since he could be the kind of chauvinist that would "put a woman

on a pedestal." (Doc. 44 p. 17) The entire opinion on summary judgement contained reasoning of this quality.

The magistrate treated Olwine's requests for discovery on sanctions issues with great deference. When Olwine requested the entire case file in the legal aid case Ullmann was required to turn over her entire file, including work product. (See, e.g. App. p. 31)

In their pretrial statement, it was obvious that Olwine was taking it upon themselves to litigate the legal aid case. (See App. p. 31). They included in their items of proof that Ullmann was discharged from legal aid with cause. The magistrate never ruled on Ullmann's motion in limine to exclude this material, thereby essentially usurping this case from the docket of the district judge.

Since Ullmann's attempts at settlement had been taken advantage of by Olwine, misinterperted by Olwine, and criticized by the court, no effort at settlement was made after

the commencement of the litigation. (Doc 40 p 39) The court made no effort to initiate settlement discussions prior to trial.

Toward the end of Ullmann's testimony, at the lunch recess, the magistrate called Hoppe and Glasper into chambers. (App. p.2) When in chambers, he informed the attorneys that he thought the case should be settled and told Glasper that he was "facing a very real threat of sanction." The magistrate then asked Hoppe how much time he had in the case. Hoppe responded not with a time figure, but a monetary one, $80,000 not including the trial.(App 2, 43 [note, magistrate indicates petitioner's testimony was correct, but scrupulously avoids making a direct finding regarding his own statements])

When Glasper informed Ullmann of this threat she became alarmed, and at the end of the lunch recess requested more time to consider the circumstances. The magistrate gave her only an additional ten minutes. (See, e.g. App 3)

Fearing the huge monetary sanction that it was apparent that the court was going to levy if the trial continued, Ullmann capitulated to a settlement that gave her no relief whatsoever of her claims. (See App 4, 22, 25-6)

When Ullmann made her statement before the court regarding the settlement she was the embodiment of the legal term of duress. She was crying, shaking and choking (App p.22). She indicated that there was no basis for Rule 11 sanctions and that her case was sound. (App. p. 59) But she felt that the risk posed was too great considering the small size of the wage claim. She indicated she did feel something had been accomplished by the litigation. (App. p. 59)

When first she was presented with the settlement agreement, Ullmann objected to Olwine's attempts to force additional concessions from her, then finally refused to sign the document due to its illegality. (App. p. 48-9, 60)

The only hearing on the issue of duress and enforceability of the settlement was an impromtu call from the magistrate requiring Glasper to attend an informal meeting which Ullmann was not informed of until it was over. (See, eg. App 41-2)

The magistrate ordered the agreement enforced and set a hearing for defendants on the issue of sanctions.

At the hearing on sanctions, Ullmann testified regarding what Glasper had told her occurred in chambers, Olwine made no objection to this hearsay. (See App. p. 43) Hoppe offered no testimony to contradict it, though he had first hand knowledge of what occurred in chambers. (id.)

In his decision and order of sanctions, the magistrate determined that Ullmann's testimony accurately reflected what occurred in chambers. (id.) However, he found her argument of duress factually frivolous since the threat of sanction was made to her through her

attorney/agent and not to her directly. (App 6, Cf. 43) He found her argument that judicial officers should not threaten parties or their with sanctions to be frivolous. (App. p. 45) He also determined that her argument that as a rule of procedure, Rule 11 was not a claim or bargaining chip, but a tool of the court to be legally frivolous.(id.)

Ullmann appealed this case to the 6th Circuit, which sustained the finding below on the factual basis that Ullmann had only been threatened through her attorney.(App. p.66) They sustained the legal determination based upon the finding that a motion for sanctions is a counterclaim. (App. p. 65)

Ullmann filed a petition for rehearing which was denied. (App p. 73).

REASONS FOR GRANTING THE PETITION

FRCP 11 has become a major factor in American litigation. It has intitiated the "Era of Sanctions," and has effected the use and interpertation of other sanctioning powers, such as 28 USC 1927, "Rule 11 is Only the Beginning," American Bar Journal, May 1, 1988., p. 62.

Since there has been no definitive decision determining whether the purpose of the rule is deterrence or compensation, evenhandedness in application is unlikely, Grosberg, "Circuit Gives No Guidance in Eastway," National Law Journal, September 14, 1987. Also, since the rule is mandatory in application but discretionary in choice of sanction, problems with the impact of judicial bias and opinions regarding frivolousness, exist Kassin, An Empirical Study of Rule 11 Sanctions, at 2.

This creates a disparity and a problem of fair application, Schwarzer, "Rule 11

Revisited," Harvard Law Review, Vol 101, 1988. Because sanctions have penal consequences, including injury to a lawyer's reputation and investigation by state bar associations, fairness requires that the circumstances in which sanctions are required be defined with reasonable certainty and predictability, id. Without a definitive set of guidelines, FRCP 11 will become not "a tool for caseload management, but ..a random instrument of judicial intimidation," Note:"Plausible Pleadings:Developing Standards for Rule 11 Sanctions," 100 Harvard Law Review, 650.

This case is appropriate for determination of these important issues because it squarely addresses the question of whether deterrence or compensation is the goal of the rule, and what effect this has on the rule's validity under 28 USC 2072.

Since this case is a virtual catalogue of sanctions abuse, by both movants and the court, many issues can be determined in one case that

will present the district courts with a number of sanctions guidelines.

I.Is Fed. R. Civ. Proc. 11 a strategic tool to be used by litigators regardless of the actual frivolousness of the opponents position and is such tactical use of the rule itself sanctionable? Does it constitute retaliation under 42 USC 2000e et seq. when used tactically by a defendant in a Title VII case?

From the time that Olwine first filed its motion for sanctions pursuant to Rule 11, Ullmann has argued that it was a tactical move used to intimidate her and distract the court from the real issues in the case. The Third Circuit has noted this abuse of Rule 11 and warned attorneys against it in their circuit:

> "The use of Rule 11 as an additional tactic of intimidation and harassment has become part of the so called "hardball" litigation techniques espoused by some firms and their clients. Those practicioners are caut-

> ioned that they invite retribution from courts that are far from enchanted with such abusive conduct," Gaiardo v. Ethyl Corp, 835 F2d 479 at 484

The sanctions motion brought by Olwine was itself without basis, yet they hammered away at it during the entire proceeding, without so much as a word of criticism from the magistrate. The manner in which Olwine handled the case in and of itself shows that they did not even consider it a frivolous matter. There were two attorneys at Ullmann's deposition, including Gary Hoppe, who is a partner in the firm. Three attorneys, including Taylor at the trial, as well as a summer law clerk. Two attorneys worked 56 hours on the motion to enforce the settlement (App. p. 69)

This is not how most law firms respond to frivolous lawsuits. The sanctions motion was tactical and itself sanctionable. The Advisory

Committee Notes state that the court has an obligation to ensure the system's effective operation, 97 FRD 200. This should include policing improper sanctions motions. Petitioner urges the court adopt the position of the Third Circuit on this important issue.

This question also contains within it the issue of when the issue of bad motive is to be considered. As a tactical ploy, Olwine made their initial appearance in this case with allegations of bad motive. (Doc. 10) The court made determinations of bad motive based on improperly admitted extrinsic evidence in the decision on summary judgement.

This ignores the plain language of the rule which, by using the conjunctive "and" before the language concerning motive, indicates
that the actions must be determined to be without basis in fact or law before bad motive is considered. This is the 9th Cir. position, Hudson v. Moore Business Forms, 836 F2d 1156 (9th Cir. 1987)

The use of sanctions as a tactical ploy also involves the issue of when extrinsic evidence should be considered. The magistrate allowed Olwine to submit huge quantities of extrinsic documents and to discover Ullmann's entire case file, including work product in the legal aid case. Then Olwine says in its pretrial statement that it is going to prove Ullmann was discharged with cause from legal aid. (See App. 31)

This is not only facially absurd, but a violation of specific language in the advisory committee notes, which indicate that sanctions are to be decided on the record, without discovery, 97 FRD 201. The Seventh Circuit has adopted this position, holding that discovery is only for extraordinary circumstances and extrinsic evidence should not be considered unless the claim is first found to be frivolous, Indianapolis Colts v. Mayor and City Council, 775 F2d 777 (1985)

This case also presents the issue of

whether such tactical use of sanctions motions constitutes retaliation under 42 USC 2000e3. Since filing suit in federal court in good faith is protected by this statute and is considered vital to the vindication of these federally protected rights, attempts to intimidate plaintiffs with tactical sanctions for filing suit falls squarely within this language, Hudson v. Moore Business Forms, 836 F2d 1156.

However, the determination of remedy in this situation is problematic, as is the conflict between the "good faith opposition" requirement and the objective standard of FRCP 11.

Since there is a clear pattern of retaliation in this case beginning from Ullmann's first act of opposition by refusing Taylor's invitation to dance with him through requests for attorneys fees before the Sixth Circuit, this case presents the appropriate vehicle to consider this issue.

This court should determine these issues o protect civil rights plaintiffs from ntimidation.

2. Does a motion under Fed. R. Civ. Proc. 1 constitute a claim the withdrawal of which onstitutes consideration to support a ettlement agreement, and if so, does this ender the rule invalid under the enabling egistation, 28 USC 2072?

Related to the problem of strategic anctions motions, is the use of these motions n order to obtain unfair advantage in ettlement negotiation.

The question of deterrence or compensation s the threshold determination when considering ne issue of release of sanctions as onsideration.

The primary purpose of Rule 11 is to mprove the adversary system by deterring ffensive tactics and giving the judiciary reater control over the litigation process, In e Ruben, 825 F2d 977 (6th Cir. 1987);Golden

Eagle Distributing vs. Burroughs, (9th Cir),801 F2d 1531. The language of the rule indicates the importance of court control since it allows the court impose sanctions sua sponte. (App. 77) The Advisory Committee Notes emphasize that the detection and correction of abuse is the responsibility of the court, to ensure the system's smooth operation, 97 FRD 200. The Committee attempted to clearly indicate that the word "sanctions" was being used to stress the deterrent orientation of the rule, Id. at 199. The purpose of the rule is not to give the parties new causes of action, but to protect the process, Mikalic v. ProArts, inc., 851 F2d 790 (Sixth Cir. 1988);, Frantz vs. Powerlifting Federation, 836 F2d 1063. (1988);Port Drum v. Umphrey, 852 F2d 148. Several appellate courts have held that the court can still impose sanctions after voluntary dismissal although this is not universally accepted, Muthig vs. Brandt Point Nantucket, Inc , 838 F2d 600; Szabo Food Service Inc. v. Canteen Corp. 823 F2d 28.

This further demonstrates that rule 11 is to remain in the courts control. The court controls the sanctions process, it is not the parties to trade. A movant cannot effectively stop imposition of sanctions by withdrawing their motion, so withdrawal is not consideration, nothing is given in the exchange.

In disposing of Ullmann's arguments, the Sixth Circuit found that Rule 11 was a counterclaim. Although the magistrate never referred to it as a counterclaim, he called it a claim and treated it as substantive claim in both of his opinions. The term counterclaim implies a substantive right, See Fed. R. Civ. P. 8. However, if the rule does in fact create a substantive right upon which a counterclaim is based, it is invalid under 28 USC 2072, Sibbach v. Wilson Co. 312 US 1 61 S. Ct. 422. If the Sixth Circuit's view of the rule is correct, then it exceeds the enabling legislation, rendering it invalid.

This court's opinion in Evans v. Jeff D., 106 S. Ct. 1531, which held that the right to attorneys fees under 42 USC 1988, is not analogous to the problem presented here, and indeed it has been cited by no one in this case. It should be distinguished at this point, however.

In Evans, the Court determined that the attorney fee provisions of 42 USC 1988 were to be used as one weapon in the arsenal of federal law to eliminate discrimination, and it was to be used flexibly. The advisory committee notes indicate that Rule 11 has a completely different purpose, to give the court control over the litigation process. Fees pursuant to 42 USC 1988 create a statutory right for a plaintiff. Rule 11 is a rule of procedure to govern the court's processes. The holding in Evans, therefore, does not apply to Rule 11.

This decision is in conflict, although not directly, with the Fifth Circuit's opinion in Port Drum v. Umphrey, 852 F2d 148 which

determined that FRCP 11 does not create a substantive right or create a claim upon which federal jurisdiction can be based

3. Is a settlement, which a civil rights plaintiff is induced to enter only due to threats of sanctions by the court, "knowing and voluntary" as required by Alexander v. Gardner-Denver, 315 U. S. 36 and when is a hearing on the issue of duress required?

In Alexander v. Gardner Denver, id. this Court determined that any waiver of Title VII rights must be knowing and voluntary. Since that time, the court has given no further direction or explanation of how "knowing and voluntary" is to be interperted and applied. Several courts of appeals have dealt with the issue, and have all determined that the agreement must be in good faith, without overreaching or exploitation or coercion, Runyan v. NCR. Corp., 759 F2d 1252, (6th Cir.); Fulgence v. MeDermott, 662 F2d 1207.

However even with these precedents, the

Sixth Circuit refused to recognize the problems created by threat of sanctions. Now that sanctioning both attorneys and parties is a common event, further direction in this area is needed. No party to any lawsuit, especially a civil rights suit, should be frightened into relinquishing a colorable claim as a result of threats of sanctions from the court.

Also of great concern is the fact that it was determined that the settlement in this case was knowing and voluntary without any oral testimony being taken from Ullmann.

The court should use its supervisory powers to ensure that this does not occur. This is a particularly thorny problem since often such threats will be made off the record and in chambers, as was done in this case. This case presents the appropriate vehicle to deal with this problem since there is no question the threat was made to Ullmann's attorney and the her testimony and actions are consistant with the threat of sanctions being the motivating

force behind her decision to relinquish her claims. The petitioner specifically stated when she settled the case that she felt that there was no basis for sanctions, but that the risk in continuing the case was too great. (App pp. 59-60). Although the Sixth Circuit ignored the statement in its analysis, indicating Ullmann did not not precisely say she was threatened, the statement is specific that Rule 11 was a factor (App. 55-6)

The magistrate and the Sixth Circuit also reasoned that no duress occurred since the threat of sanctions was said to Ullmann's attorney and not to her directly. This is a distinction without a difference. (App 66) This conflict with both common sense, basic principles of agency and the Second Circuits decision in Kothe v. Smith, 771 F2d 667, which held that threats of sanctions should not be made against attorneys or parties. This is also inconsistant with the Sixth Circuit's own opinion which held that neither attorneys nor

parties should be threatened with sanctions by the court to prevent appeal, Webster v. Sowders, 846 F2d 1032 (6th Cir. 1988).

4. Does it create a conflict of interest for an attorney to negotiate a settlement, at the initiation of the court, which exchanges his client's substantive claims for the withdrawal of a motion for sanctions against both the attorney and client?

It is a well established ethical principle that an attorney must represent his client free of any financial or personal interests that may impede his professional judgement on behalf of the client, Evans v. Jeff D., id.; ABA Model Code of Professional Responsibility, 5-1 5-2, 1.7b,2.1.

In Evans, this court determined that the ethical problem did not exist, since the right to fees belonged to the client, and not to the attorney, id. It is also notable that Jeff D. was represented by a legal aid society, so no fees would not be received by the attorney

personally in any event. In cases of private counsel, the client will have to pay the attorney regardless of whether fees are awarded as part of their suit.

However, when an attorney is threatened with a potential monetary sanction, the situation is very different. As the Sixth Circuit recognized in In re Ruben, 825 F2d 977 when both an attorney and client are threatened with sanctions, problems with conflict of interest may arise. This conflict may be sufficiently severe that separate representation is required, id.

Since it was the court that created the conflict of interest here, it is again a circumstance that needs this Court to exercise his supervisory authority to prevent. The problem is clearly presented by the facts here, and the conflict is clear. Olwine even executed releases of the claims, not only against Ullmann, but against Glasper. (See App. p. 25)

Both Ullmann and Glasper were facing the threat of sanctions. Olwine's motion was against both. The immediate threat at the time the court recommended settlement was, however, made to Glasper alone, and by the court itself. Not only was the threat made, but it was made in terms that make the monetary conflict of interest clear. When asked for the amount of time he had in the case by the court, Hoppe responded instead with a monetary figure and a bloated one at that. His response was $80,000 not including the trial. That figure is so large that most people have trouble visualizing it. The figure was named, no doubt to intimidate. And it created a clear problem of conflict of interest. And since the court itself was encouraging the settlement, and rushing the parties in doing so, it made the conflict nearly impossible to detect at the time it was occurring. Most attorneys would not imagine that a court would pressure them into a conflict situation. Olwine even

executed releases of the claims, not only against Ullmann, but against Glasper. (See App. p. 25)

5. Is a judge or magistrate required to recuse himself from consideration of the validity of a settlement and determination of whether refusal to sign the settlement is sanctionable if the party refusing to sign alleges the settlement is invalid because their agreement was obtained only through judicial intimidation?

Strict compliance with standards of judicial ethics is vital if litigants are to have faith in the courts to fairly decide their disputes. This court has shown great concern regarding areas of potential judical impropriety. This court has determined that "justice must satisfy the appearance of justice," Offutt v. United States 348 U.S.11, 14; 75 s. Ct. 11, 13 99 L Ed. 11. There must be an impartial and disinterested tribunal for the requirements of Due Process to be ensured,

Marshall v. Jerrico, Inc., 446 U.S. 238; 100 S. Ct. 1610 (1980). The feeling and reality of fairness must be preserved, "generating the feeling, so important to a popular government, that justice has been done," Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 172, 71 S. Ct. 624, 648, 95 L.Ed. 817 (1951). But no ruling has discussed ethical problems which arise in the two procedural areas that are presently undergoing the most development, the use of sanctions and the use of court supervised settlement negotiations. The conflict is apparent in this case.

28 USC 455 encompasses the ideal of due process by providing that a judge or magistrate must recuse him or herself in any case that they are a witness to the facts of a case. If an in chambers, off the record settlement conference leads to accusations of judicial intimidation, there is no doubt that the judge becomes a witness to what occurred, and a vital one since there is no record. And if in fact

there are accusations of impropriety, the self interest of the judge becomes a very obvious problem. "..No man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome," In re Murchison, 349 U.S. 133; 75 S. Ct. 623 (1955)

Murchison specifically addressed the problems that arise when a judge makes determinations regarding factual situations occurring in chambers. It specifically discusses the problems due to the fact that the judge had his own personal knowledge and impressions of the factual situations he was to be determining, Id., at 626. The Court noted the impossibility of testing these judicial impressions by adequate cross examination, id.

When a judge is in a position that he is determines whether or not he intimidated a party off the record, he is acting as a judge and a witness in his own case. The factual situation here required recusal under the holding of Murchison, and the requirements of

28 USC 455. It is especially disturbing here that because Ullmann was denied an oral hearing by the magistrate on the issues of voluntariness, she never had the opportunity to present Glasper's testimony regarding what occurred in chambers.

The petitioner should not have had the issue of sanctions determined by this magistrate either, and the same problems exist in that decision. In the only case to date discussing recusal in relationship to the sanctioning power, the Ninth Circuit held that if the judge had been vilified by and attorney during the proceeding, that same judge should not determine the sanctions issue, In re Yagman, 796 F2d 1165.

By the time the issue of sanctions was determined, Ullmann criticized the magistrate for his sexist statements in the summary judgement opinion, argued that he had usurped the legal aid case from the district judge because of his friendships with some of those

defendants, and accused him of intimidating her in order to obtain a settlement favorable to the Olwine. Under the Ninth Circuit rule, recusal would have been required, and this court should consider the adoption of a similar standard.

The bias of the magistrate is very clear in the opinions. He complains about her attacks on his fairness and then launches into a tirade about her incompetence, criticizing her personally for failing to serve subpoenas, a job of her counsel and other decisions he is not privy to. (App33-4) He implies she is incompetent because she did not make objections when she was on the stand testifying. (App 34) He makes veiled references to harmful admissions petitioner allegedly made in her deposition, but mentions none specifically.[App. 13 (There are none)]

He quotes her motions and testimony out of context, intentionally changing the meaning. He intentionally leaves out any mention of Rule

11 when he quotes her statement to the court on settlement. Cf. App22 and 59. He even takes a legal argument, which is based on established law from the Second Restatement of Contract, quotes it as testimony and says it proves Ullmann is crazy. (App 16-7) He makes finding of facts on the earlier alleged agreement, although the issue had been retained for trial, and no evidence had been present on it prior to the trial being interrupted. (App 13)

Probably the worst example of bias is the abuse of the sanctions power. He sanctions Ullmann, but completely ignores sanctionable and unethical conduct on the part of Gary hoppe and Olwine. They submitted perjured testimony, and the magistrate discounts it as not material enough to be sanctionable. (App 29)

Perhaps the most disturbing circumstance in this case is the way the Sixth Circuit skirted the issue of recusal. Although Ullmann raised the issue in her brief and elaborated on it in her petition for rehearing, it went

unnoticed. This is clearly a circumstance in which the Sixth Circuit "has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision," SCR 17 .1 (a).

6. Does 28 USC 1927 authorize the an award of attorneys fees against an attorney/party who makes arguments of first impression, based both in fact and law, consideration of which lengthens or complicates the court proceedings?

Petitioner's position is amply supported by the relevant statutory and case law. There is plainly no reason to sanction her on that basis. however, her actions were found sanctionable. These are important arguments of first impression, See Eastway Corp. v. City of New York, 762 F2d 243 (1985). The only basis could be because the proceedings were somewhat lengthened.

The petitioner is also requesting the Court

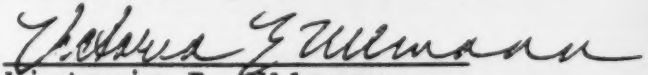
to elaborate the standard of review by the appellate courts on the imposition of sanctions. The Sixth Circuit's review here was so rudimentary, they did not even indicate the standard they were using. Ullmann urges the court to adopt the Ninth Circuit's tripartite review which requires the factual determinations to be governed by the clearly erroneous standard, that whether the conduct was legally sanctionable be determined de novo and the amount and type of sanction be determined according to the abuse of discretion standard, Golden Eagle Corporation, id. at 1530. Ullmann urges this court to adopt the standard and apply it to considerations of both Fed. R. Civ. Pro. 11 sanctions and 28 USC 1927 sanctions.

Conclusion

The problems described in this petition are precisely those the Court should review under the supervisory power. The decision here is in conflict with the principles of sanctions,

prior decisions of this court and with findings of other courts of appeals. These are important questions of first impression that need direction and resolution by this Court. Further, it this Court determines that this case does not merit full consideration, petitioner requests the Court grant certiorari for the limited purpose of reversing the order of sanctions.

Respectfully submitted,



Victoria E. Ullmann
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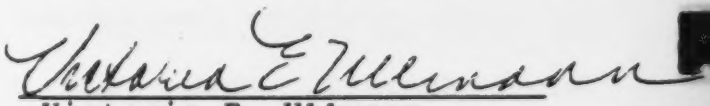
614-466-0905/237-5858

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing petition was served on Gary Hoppe, as attorney for Olwine, Connelly and Job Taylor III by regular mail service on January 18, 1988



Victoria E. Ullmann
Attorney at law

No.

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1988

Victoria E. Ullmann, Petitioner

v.

Olwine, Connelly, Chase, O'Donnell and Weyher

and Job Taylor III

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

APPENDIX I

Victoria E. Ullmann,
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2658-F Old Forge Road
Columbus, Ohio 43209
614-466-0905/237-5858

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

VICTORIA E. ULLMANN,

Plaintiff, : Civil Action No C-3-85-233

-vs-

OLWINE, CONNELLY, CHASE, O'DONNELL and WEYHER, et al

Defendants

MEMORANDUM OPINION AND DECISION GRANTING DEFENDANTS' MOTION TO ENFORCE SETTLEMENT AGREEMENT AND FOR SANCTIONS AND DENYING PLAINTIFF'S MOTION FOR SANCTIONS

This case is before the Court upon motion of Defendants'(Doc. # 111) to enforce a settlement agreement between themselves and the Plaintiff.

Plaintiff commenced this action by filing a thirteen count Complaint in March, 1985. Defendants responded with a summary judgement motion and a motion for sanctions under Fed. R.

Civ. P. 11 (Doc. #6). In August, 1986, the parties consented to magistrate trial juridiction under 28 USC Sec. 636(c) (Doc. #29, 30, 31). The Court then ruled on the summary judgement motion by dismissing ten of thirteen counts and Defendants filed a three count counterclaim. Two of those counts were dismissed and the case proceeded to trial on July 27, 1987, without a jury. In the claims remaining for trial, Plaintiff sought relief on two theories under Title VII of the Civil Rights Act of 1964 and a declaratory judgement that prior settlement between her and the Defendants did not bar her from proceeding. Defendants sought damages in fraud related to the prior settlement.

Plaintiff was her own last witness. Near the end of her direct testimony and shortly before the usual lunch recess, the Magistrate inquired of both counsel if there was any possibility of settlement. Defendant's counsel indicated his willingness to forego the counterclaim and request for Rule 11 sanction

in return for dismissal of the Complaint with prejudice and general releases of all persons involved in the case; he absolutely refused to consider paying any money to Plaintiff, expressing his confidence in the strength of Defendants' position. Defendants' counsel advised the Court and Plaintiff's counsel that Defendants' counsel had expending approximately $80,000 in attorney fees prior to starting the trial; since he felt the entire case was frivolous, he stated to the Court and Plaintiff's counsel his belief that the entire amount of such fees could be recovered under Rule 11.

Plaintiff's counsel asked for time to discuss the matter with his client over the lunch recess and an extended recess (more than 1 1/2 hours) was taken.

When the parties returned after lunch, Plaintiff's counsel indicated the proposal was acceptable in principle, but that details needed to be negotiated. The recess then continued another 1 1/2 hour until counsel

advised the Court that an agreement had been reached.

Because of the acrimony between the parties, the Court insisted that the settlement be recited for the record. That record has now been transcribed and is filed at Doc. #108; it shows that Court resumed at 3:00, proving that Plaintiff had over three hours to discuss the settlement, rather that the ten minutes she asserts in her motion papers. The record shows that Mr. Hoppe carefully stated the terms as he understood them. Mr. Glasper, Plaintiff's counsel, listened carefully and corrected one omission Mr. hoppe had made. All parties stated on the record that what had been represented their agreement.(Defendant Job Taylor additionally asked that the record be sealed and all parties recognized this would have to be by separate motion to the Court) Miss Ullmann explicitly said that she was settling the case (Doc. 108, p 6).

The arrangements for memorializing the settlement were that Mr. Hoppe was to prepare

what he believed was the appropriate documentation and forward it to Mr. Glasper, which he did (Hoppe Affidavit, attached to Doc. 11, Par.2) Mr. Glasper was to review the paperwork, approve it, sign it and forward it to his client, which he did (Hoppe Aff. Par 3). Miss Ullmann was then to execute the documents, which she had refused to do (Hoppe Aff. Pars 6, 7), occasioning the instant motion.

Miss Ullmann concedes throughout her opposing papers that a settlement in fact was reached. She opposed it on three grounds:

1. Part of the consideration given by the Defendants given by Defendants--waiver of their Rule 11 claims--either is so insubstantial that it should not count as consideration because Defendant's did not have a colorable sanctions claim or should not legally be permitted to be consideration for a settlement in any case;

2 . The settlement was coerced by the threat of sanctions and insufficient time to consider the the issues involved and therefore not voluntary on her part.

3. Assuming a valid agreement was reached, it has been rescinded by the acts of the parties to it.

Each of these grounds will be considered in turn.

A. CONSIDERATION FOR THE SETTLEMENT

1. Waiver of Rule 11 Sanctions as to Filing of the Complaint Itself.

Part of the consideration for the settlement was Defendant's waiver of their claims against Plaintiff under Fed. R. Civ. P. 11 (doc. 108, P. 2). Reading Miss Ullmann motion papers, one would be led to believe that the issue of Rule 11 sanctions hd been raised for the first time when the Magistrate interrupted her testimony, called counsel into chambers and threated to impose $80,000 to $100,000 in attorney fees unless she settled, Nothing could be further from the truth.

Defendants first sought Rule 11 sanctions in connection with their intitial motion for summary judgement. filed in April, 1985, in response to the Complaint. Defendants asserted

that the complaint itself was sanctionable because unfounded in fact or law and filed for the purpose of harassment. (See Doc. #6)

When ruling on the motion for summary judgment, the Court reserved ruling on the Rule 11 motion. It was the Court's position that discovery and trial would disclose whether there was a reasonable factual and legal basis for the Complaint (doc. #44, P.36) Therefore, a ruling on that sanctions motion was deferred until after trial. The parties were specifically advised in the pretrial order that the Court would take up that motion once the trial was concluded (doc. 100). If the Plaintiff prevailed on the merits or at least presented a colorable case, Defendants' assertion the Complaint was baseless would obviously be moot. But if Defendants had an arguable Rule 11 motion that the complaint itself was baseless, Plaintiff would still be entitled to a hearing on sanctions. Postponing the question until after trial served the purposed of judicial economy and also the

convenience of the parties, who could thereby make one trip to Dayton rather than two. No party ever objected to the postponement of the motion until after trial.

The court never indicated, verbally or in writing on or off the record that it had decided the merits of Defendants' initial Rule 11 motion related to the filing of the Complaint. However, Plaintiff's position that the original sanctions motion was so baseless that its dismissal is not adequate consideration for settlement now requires the Court of express some opinion of that motion.

The weakness of the complaint is demonstrated by the dismissal of ten of its thirteen counts on motion for summary judgment. Plaintiff submitted no factual material in opposition to the motion for summary judgment except her own affidavit. Several of the counts were dismissed without prejudice for failure to state a claim, but Plaintiff never bothered to file an amended complaint. As the Court indicated in its Decision on the summary

judgment motion, Plaintiff faced a serious credibility problem on the undismissed counts because of her extraordinary correspondence with Defendants after her termination, coorespondence which Plaintiff characterized as normal negotiation but which Defendants have more accurately called "extortionate." (Taylor Aff. Doc. 6, Par. 17) Miss Ullmann had filed a complaint on claims at least partially settled and partially withdrawn by her from the Ohio Civil Rights Commission evaluation to avoid an adverse probable cause determination. The court believes the Defendants' case for Rule 11 sanctions as to the filing of the complaint for its waiver to be sufficient consideration to support a settlement.

2. Waiver of Sanctions for Post Filing conduct.

Defendants also sought sanctions against Plaintiff for her behavior in conducting this case, as well as bringing it (Doc. 104, 105). Defendants' supplemental sanctions motion was filed on the first morning of trial and largely

summarized the position Defendants had taken in numerous conferences and prior filings with the Court that Plaintiff's conduct of the case after filing was sanctionable.

In contrast to the Court's silence on the merits of the original Rule 11 motion, the Court has already found much of the complained -of conduct during the course of trial preparation to be in violation of the civil Rules and this Court's trial preparation orders.

Some of the worst examples of inappropriate and unprofesional conduct are as follows:

1. Ignoring the Court's scheduling order by attempting to add twenty eight witnesses or categories of witnesses to the trial list six weeks after it was due and less than a month before discovery cut-off (See Discussion at doc. 67, pp.5-7)

2. Setting deposition on inadequate notice, (See Doc. 76, 85, 86)

3. Failure to properly prepare the

required final pretrial order, including failure to prepare proposed findings of fact and conclusions of law and failure to prepare a trial brief (Doc. 100, pp 2-3)

4. Failure to preserve testimony or obtain the trial appearance of designate expert witnesses Laura Stafford and Eugene Brundige.

5. Failure to tender trial exhibit conforming to the exhibits listed in the final Pretrial Order.

6. Attempted interlocutory appeal from a non-final order.

7. Utterly frivolous notion to disqualify, filed to delay trial without support in law and based on facts know to Plaintiff when she consented to Magistrate trial jurisidiction in the first place. (See Doc. 93)

8. Failure to serve trial subpoenas on listed witnesses (Doc. 103)

Some of this behavior has already been sanctioned: the late witness list was stricken, and failure to subpoena witnesses carries its own penalty. The Sixth Circuit has emphasized

that sanctions motions must be carefully analyzed for a statutory or rule basis and separated as to which conduct is being sanctioned under which rule, In re Alan Miles Ruben, No. 85-3986.3987 (6th Cir. July 30, 1987) Although all of this conduct is unprofessional, some of it is not sanctionable at all and some may be sanctionable under authority other than Rule 11.

However, Defendants draft settlement agreement proposes to waive and release all sanctions claims (Doc. 111, Ex. 2, Pars 5 & 6). Prima facie, a strong claim could be made for sanctions under Rule 11, 28 USC 1927 and /or the Court's inherent power at least as to the late witness list, the improper appeal, and the groundless motion to disqualify. Waiver of those claims, entirely apart for the claim for sanctions as to filing the Complaint, is sufficient consideration to support eh settlement agreement

3. Waiver of the Counterclaim

Defendants also agreed to waive their

counterclaim for fraud as part of the settlement.

Plaintiff had previously settled hers dispute with Defendants for $1500. After accepting and cashing the check, she wrote to Defendant Taylor that she had only done so to keep her options open and began a long letter writing campaign to obtain more money (See Exhibits to Doc. #6). Defendants have asserted from the outset that the $1,500 was agreed upon as a settlement in full of all claims by Plaintiff. While dismissing two counts of Defendants' counterclaim, the Court refused to dismiss the fraud claim (Doc. 63) and there was strong evidence to support it: Plaintiff's own admission that she had accepted the check only to "keep her options open" (See Exhibits to Doc. 6) by itself, Defendants' release of their Counterclaim for fraud would have been sufficient consideration to support the settlement agreement.

4. Legal Sufficiency of the Sanctions Waiver

Plaintiff argues that possible Rule 11 sanctions should not be allowed to be used as a "bargaining chip" in settlement negotiations (doc. 116, pp 5-6). She correctly notes that Rule 11 has deterrent purpose as well as a compensatory one, that sanctions are mandatory once a violation has been found and that sanctions can be imposed by the court sua sponte, Ruben, supra; Albright v. Upjohn, 788 F2d 1217 (6th Cir 1985)

However, the Sixth Circuit has strongly emphasized that, while the imposition of sanctions is mandatory once a violation is found, the measure of sanctions is largely compensatory:what has it cost the injured party to respond? Ruben, supra. Parties injured by Rule 11 violations have a duty to mitigate their damages and courts are instructed to decide whether they had overspent in responding to such violations.

Since the district courts have sua sponte authority to impose Rule 11 sanctions, this Court agrees that parties may not bargain away

that power in a particular case. But the Court also knows of no valid reason why a party cannot given (sic) up its own claim to compensation for such a violation. The law strongly favors settlement of disputes. Certainly given the demands on judicial time, that policy applied very strongly to meritless litigation. to rule that a party cannot give up its claim to compensation for defending what it regards as a frivolous claim in order to obtain a dismissal with predjudice of such a claim would be in essence to rule that courts must try all such claims and the resultant Rule 11 motions, even though the parties agree that the complaint is sufficiently weak and the Rule 11 motion is sufficiently strong that reciprocal dismissal are to their mutual benefit. That position assumes unlimited judicial resources and is completely contrary to the policy favoring settlements. This Court holds that waiver of a claim to compensation for Fed. R. Civ. P. 11 violations may legally be consideration for settlement of litigation.

In sum, Defendants' waiver of their sanctions claims, along with their fraud counterclaim, was factually and legally sufficient consideration to support the settlement agreement

B. PLAINTIFF'S CLAIM OF DURESS

Plaintiff asserts the settlement agreement is void because her assent was induced by duress, to wit, the threat of sanctions. A distinction must be drawn between two kinds of threats which are not clearly distinguished in Plaintiff's Memorandum.

A threat by a judge to impose sanctions unless a party settled at case might well be duress sufficient to void a settlement. Factually nothing of that sort happened in this case. The Magistrate never spoke personally with the Plaintiff about sanctions, nor did he tell her counsel that he would impose sanctions if she refused Defendants' offer. She concedes as much by not contending there was any personal conversation or indirect threat through her counsel. Instead she says: Even if

the court did not intend to indicate that plaintiff would be sanctioned, the magistrate's comments and attitude created that impression. (Doc 116 p.8)

Plaintiff's notion of a threat of sanctions from the Court is, by her own admission, a product of her inference from the circumstances or her imagination. She gives no indication which of the Court's comments or manifestations of attitude created this "impression." Furthermore, this inference is all post hoc. When called upon in open court to comment on the settlement and indicate if she assented, Plaintiff, an attorney admitted to practice for nearly ten years, made absolutely no suggestion that the Court had threatened her.

The Court did initiate the settlement discussions by asking whether counsel thought is was appropriate to discuss settlement. But the court did so at the point when the Plaintiff's case was at tis strongest: near the end of Plaintiff's case in chief and her own

postion. Plaintiff was nearly at the point of resting her case. She had failed to obtain the presence of testimony of either of her expert witnesses. She had failed adequately to serve subpoenas on several of her key factual witnesses. She had failed to lay an adequate foundation for the admission of many of her exhibits. She was about to be cross examined. and Defendants had her deposition in which she made a number of quite damaging admissions.

While Plaintiff's position was not strong at that point, it could only have gotten worse. She had no additional witnesses to offer. If. defendants prevailed on a motion to dismiss at the close of Plaintiff's case. They would have no incentive to give up their sanctions claim.

There was no bad faith in Defendant's pressing their sanctions claim during settlement negotiations. "Bad faith would seem to imply on insisting on a claim known to be worthless or worth little. But all parties knew the Court had dismissed ten of the thirteen counts in the Complaint and had

expressed its opinion that several aspects of Plaintiff's pretrial conduct were sanctionable. Defendants could reasonably infer from the facts that they had a good chance of prevailing on their sanctions motion. Insisting on a claim on which one has a good chance of prevailing is hardly bad faith.

Plaintiff claims that even if Defendants were not acting in bad faith, they somehow abused their power in pressing their sanctions claim in settlement negotiations. This argument is opaque to the court. If Plaintiff means that Rule 11 sanctions should never be used as a "bargaining chip" in settlement, that argument had already been dealt with. If Plaintiff means something else, she has not adequately explained her meaning to the court.

If there was any objective coercion of Plaintiff (as opposed to her subjective impressions), it was from the circumstances in which she found herself. Her case had barely survived summary judgement. What survived had been poorly prepared for trial and

substantially undermined by her admissions on deposition and her failure to have any key witnesses present or preserve their testimony. That is indeed a perilous condition for a Plaintiff near the end of her case in chief.

Plaintiff is wont to whine about the imbalance of power in this case between herself and the Defendants, whom she characterizes as a "large Park Ave law firm." However, when she was threatening to sue them, she bragged of her ability to conduct sophisticated litigation and warned it would cost them more to defend themselves than to pay her off. (Ullmann letter to Taylor 11/30/84, attached as Ex. 8 to Taylor Affidavit, Doc. 6)

But if Plaintiff had, as she asserts "complete confidence in her case" (Affidavit of Plaintiff attached to Doc. 116 Par. 3), she had a readily available alternative: the Court was fully prepared to proceed with the trial. A full week had been set aside, a courtroom available, no other cases were set, and a court reporter was present. All Plaintiff had to say

was "no" instead of yes (Doc. 108, p6), that she was in agreement with the settlement terms as they had been discussed.

Plaintiff now complains that she did not have enough time for reflection and research. She never asked the court for additional time.

Plaintiff notes that she was tearful and emotionally distraught during the settlement recital and therefore it was involuntary. She did not ask for time to compose herself. The Courts notes that she has used the same excuse to attempt to avoid the consequences of having settled this matter before with Defendant Taylor.

Plaintiff claims that she gets little or nothing form the settlement, but on the record she said

> The goals that I wish to accomplish have largely been accomplished. I feel that litigate it will not particularly assist anyone with similar problems, however, by pursuing publications with the ramifications of the agreement with

> Defendants I believe that there will be benefit provided to both myself and any any one else that wishes to lititigae in this area and concerning the low amount of wages that is actually at stake in this matter it seems that is has reached the point of diminishing returns as far as I am concerned. (Doc. 108 p

Much litigation, including criminal cases is settled during or on the eve of trial. That is because the heated crucible of trial forces parties to reassess their situations realistically and to make the best bargain the circumstances allow. That is what Plaintiff did here. Rather that live with the bargain she struck, she is now attempting to obtain an additional cash payment for Defendants (See P. 4 of Plaintiff's 8/17/87 letter to Mr. Hoppe, Ex. 5 to Doc 111)

Plaintiff is an experienced attorney. She agreed to on the record in open court without any protest of conditions to quite explicit

terms of settlement. If she is permitted to repudiate this settlement on grounds that it was involuntary, then it is hard to imagine any settlement agreement which would be enforceable.

c. Plaintiff's claim of recission

Plaintiff asserts that by threatening to return the case to court if she did not sign the settlement agreement. The facts recited by Plaintiff, even if true, do not constitute a mutually agreed rescission. The obvious consequence of a failure to consummate the settlement would be a return to Court. The fact that neither party would admit to the other that it was concerned about such consequence does not prove they agreed to come back to court and abandon the settlement.

In sum, the Court concludes the parties voluntarily entered into an enforceable settlement agreement.

D. Terms of the Settlement

Plaintiff objects that certain terms included by Mr. Hoppe in his draft agreement

were not agreed upon in court. This objection is well taken.

This is not a case requiring an evidentiary hearing on what the terms of the settlement actually were: they were recited into the record in open court. compare Kukla v. National Distillers Product co, 483 F2d 619 (6th cir. 1973); Aro Corp v. Allied Witan Co., 531 F2d 1368 (6th cir. 1976). Nor is it a case requiring interpretation by the Court of the terms of a written settlement agreement: the parties have never signed such an agreement. Rather the Court is called upon to enforce what Plaintiff agreed to verbally, on no more.

The terms recited for the record are as follows:

1. All of Plaintiff's claims are to be dismissed with prejudice.

2. Defedants' Rule 11 Motions are to be withdrawn or denied with prejudice

3. Plaintff and her trial attorney are to execute releases in favor of the Defendants, International Business Machines corp. all

witnesses in this case and all other persons involved with the transaction out of which this case arose.

4. The facts of this case are to be kept confidential by all parties, provided that if Defendants or any of them are subpoenaed to testify about Plaintiff in any other proceeding, they will give Plaintiff notice of the subpoena but will have no other obligation to resist the subpoena.

5. Defendant's Counterclaim is to be dismissed with prejudice.

6. Plaintiff is to be allowed to make a statement on the record about the settlement.

All of these terms are clearly stated on the record of the settlement (Doc. 108)

Plaintiff has objected in correspondence with Mr. Hoppe to a New York choice of law clause in the proposed settlement agreement. In her motion papers (Aff. attched to Doc. 116 par 17) she objects to what she characterizes as a liquidated damages clause. (There is no

liquidate damages clause in the proposed settlement agreement, Doc. 111 but the document does propose mutual liability for attorney fees in the event of breach, See Par 8F. Since neither provision was agreed to on the record, neither will be enforced.

Plaintiff also claims she never agreed to make anyone beneficiaries of the settlement other than parties (Affidavit attached to Doc. 116 Par 17. The record of the settlement in open court belied this assertion (doc. 108 p 2-3)

Defendants are entitled to specific performance of the settlement agreement terms recited on the record. The Court's orders in this regard are set forth at the end of this opinion.

E. PARTIES POST TRIAL MOTIONS FOR SANCTIONS

Both parties have filed post trial motions for sanctions which will be dealt with separately.

1. Plaintiff's motion (doc. 115)

Plaintiff seeks relief pursuant to FRCP 11,

28 USC 1927 and the Court's inherent power to punish defendants' conduct.

Each item of Defendants conduct which Plaintiff claims is sanctionable occurred before the settlement was agreed upon. As part of the settlement, Plaintiff agreed to release all claims against the Defendants arising out of or connected with this litigation. Since the Court has determined that the settlement is to be enforced, Defendants are entitle to a denial of Plaintiff's motion for sanctions pursuant to the settlement.

However, even if Plaintiff had not agreed to release her claims, her sanctions motion is without merit as set forth below.

a. Plaintiff claims Defendants filed false affidavits nad misled the Court on the issue of whether Plaintiff's co-workers, the other document reviewers were independent contractors. In its Decision on the motion for summary judgement, this Court recognized that determination of this question would differ depending upon what legal significance was

given to the conclusion. The evidence of the status of the other reviewers was at least equivocal: all of them worked for a time through temporary services and for a time on direct contract with Olwine. The materiality of this matter, which seems quite important to the plaintiff, is opaque to the court. There has never been the slightest evidence that Plaintiff ever worked through a temporary service; her contract was always directly with Olwine and it was her contract that was in issue. In any event, the court sustained Plaintiff's position that she was an employee for Title VII purposes, at least for the purposes of getting by the summary judgement motion. Furthermore, Plaintiff was given the opportunity to present whatever evidence she wanted on this issue at trial and she failed to properly serve subpoenas on not one, but all three of her witnesses on this issue. Her claim for sanctions on this issues in not well taken.

b. Plaintiff also claims Defendants have

deliberately misled the Court as to the significance of the number of boxes of documents reviewed by each document reviewer (Doc. 115 p. 8 Plaintiff argues that she has testified that the boxes widely varied in content. (doc. 115 Par 18) However, she also stipulated in the Final Pretrial Order that she reviewed fewer than one half as many as the least productive reviewer and fewer than one third as many as the most productive reviewer, (Doc. 99, Uncontroverted Facts, Par. 18) The significance of that differential is for the Court to decide. The fact there is not testimony that Plaintiff got all the complex boxes and the other reviewer got the ones with the shoes and ties.

c. Plaintiff claims Defendants original rule 11 motion is sanctionable because it was without basis in existing law. The court has already found above that the motion was sufficiently well grounded to constitute sufficient consideration for the settlement agreement, and the court declines further comment on its grounding.

d. Plaintiff claims that Defendants counterclaim contained two counts which were dismissed, which is true. Those counts were for violation of Rule 11 and for malicious prosecution. Even if in the abstract the filing of such claims would support a claim for sanctions on Plaintiff's part, Plaintiff has agreed to settle this matter by, among other things, releasing Defendants from any liability arising out of the litigation prior to the settlement. (doc. 108 p2)

e. Plaintiff claims that Defendants are sanctionable for attempting to litigate the issues of Ullmann v. Grandjean (Plaintiff's case against her last employer before Defendant Olwine contracted with her) in this case. In fact no documents related to that case were ever intorduced in this case since the Court never reached Defendant's case in chief.

In sum, Plaintiff's motion for sanctions is without merit and denied in its entirety.

2. Defendants Motion for Sanctions Relating to Plaintiff's Post Trial Conduct.

Defendants have moved for sanctions for Plaintiff's post-trial conduct in refusing to execute the settlement documents or otherwise comply with her agreement to settle the case (doc. 111).

As Defendants point out the Sixth circuit has expressly held that Agreements settling litigation are solemn undertakings, invoking a duty upon the involved lawyers as officers of the Court of make every reasonable effor to see that the agreed terms are fully and timely carried out.

ARO Corp v. Allied Witan Co. 531 F2d 1368, 1372 (6th Cir. 1976)

The court finds that there is probable cause to believe Plaintiff, without any valid basis, attempted to repudiate a settlement agreement entered into voluntarily, with the advice of counsel, and in open court. There is further probable cause to believe that such behavior is in bad fiath and unnecessarily vexatiously prolonged these proceedings by requiring the Defendants to move for

nforcement of the settlement. Thus, such ehavior is prima facie sanctionable under the ourt's inherent power and under 28 USC 1927. efendants' postrial motion for sanctions is ereby set for hearing on October 15, 1987, at nich time Defendants may present evidence of neir expenses reasonably incurred enforcing ne settlement agreement and Plaintiff may show ause if cause there be, why she should not be anctioned.

Plaintiff's Attack on the Magistrate's law erk

Not content to repudiate her settlement d repeat her aspersion on the Court's irness, Plaintiff has taken occasion of her cent filing to make a gratuitous, warranted, imnmateral and unfair attack on e professional character of the Magistrate's w clerk, Theresa G. Haire. In her Affidavit tached to Doc #116, she asserts:

I saw Thereas Haire, the magistrate's law erk squeeze up her nose, wiggle her shoulders d repeat silently testimony I had just given.

Plaintiff was not capable of litigating her case. She failed to subpoena adverse witnesses, failed to arrange for the presence of her own witnesses, failed to file exhibits conforming to her witness list, failed to file proposed findings of fact and conclusions of law and failed to proffer a trial brief. She attempts to cover these and other failing by an ad hominem attack on the court's fairness through the Court's law clerk.

Needless to say, the record does not reflect any such conduct by Ms. Haire and Miss Ullmann utterly failed to note any such conduct when it could have been made matter of record. competent trial counsel observing non-verbal courtroom conduct which causes alarm would note the matter then and there for the record so that others who were present could contribute their perceptions and the Court could make a correction, rather that waiting until six weeks later to state a "war of affidavits." Ms. Haire's affidavit filed contemponeously herewith, denies categorically such conduct.

he court finds Mr. Haire's affidavit credible nd Miss Ullmann's incredible.

The court further finds Plaintiff's onduct in making this allegation against Ms. aire to be a violation of Fed. R. Civ. P. in hat it is ungrounded in fact and totally eaningless as a matter of law, and interposed or an improper purpose, to wit, to harass and idicule without cause a dedicated public ervant. Since as Plaintiff herself points ut, the court can impose Rule 11 sanction sua ponte, it shall do so for this baseless attack nless Plaintiff shows good cause to the ontrary on or before October 15, 1987. laintiff may purge herself of this violation y withdrawing the allegation and apologizing n writing to Ms. Haire.

Direction to the parties and to the clerk

It is hereby ORDERED that:

Not later than October 1, 1987, Plaintiff hall execute and deliver to the Court general eleases in the form attached to Doc. #111 releasing Defendant Olwine, Connelly, Chase,

O'Donnell and Weyher, defendant Job Taylor III, and each of nonparties International Business Machines Corp, Frieda T. Brigner, Susuan c. Gringerich. Karen A. Oswalt, Barbara Shook and Tai Agbomeirele.

2. Not later than October 1, 1987, Defendants Olwine, Connelly, Chase O'Donnell and Weyher and Job Taylor shall execute and deliver to the Court general releases of Plaintiff.

3. The court will not deliver any of the releases to any of the released parties until it has received the same in form conformable to the settlement agreement.

4. The parties are ordered to keep the facts of this case confidential, provided that if Defendants, or either of them, is compelled by judicial or administrative process to testify concerning the facts of this case, the compelled party shall give seasonable notice of the service of such process by certified mail to Plaintiff at 2658-F Old Forge Road, Columbus, Ohio 43209.

5. The Clerk shall forthwith enter judgement

dismissing the Complaint and counterclaim herein with prejudice, each party to bear its own costs. The court explicitly retains jurisidiction as necessary to further enforcement of the settlement agreement. The court expressly determines that all counts of the complaint ordered dismissed without prejudice in the ruling on Defendants' motion for summary judgment should now be dismissed with prejudice because Plaintiff has so agreed in the settlement agreement and also because Plaintiff has failed to timely pursue such claims by amending her Complaint to state claims upon which relief can be granted.

9/14/87

/s/

Michael R. Merz

UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

VICTORIA E. ULLMANN,

PLAINTIFF CIV. c-3-85-233

v. Mag. Merz

OLWINE, CONNELLY, CHASE,

O'DONNELL AND WEYHER,

DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING IMPOSITION OF SANCTIONS ON PLAINTIFF

This case is before the Court for determination of the amount of sanctions to be imposed on Plaintiff pursuant to the court's opinion of September 14, 1987 (doc. 117).

As set out at greater length in the September 14th opinion, the parties settled this case at trial on July 27, 1987, and the terms of the settlement agreement were read into the record in open court. (the transcript

of the settlement agreement appears at Doc. 108) Thereafter Defendants' counsel drafted documents to implement the settlement and forwarded them to Plaintiff's counsel, who approved them and forwarded them to his client. Miss Ullmann refused to sign them, forcing Defendants to choose between reopening the case and moving to enforce the settlement, They chose the latter course and were successful for the reasons set forth in the September 14th Opinion. They now seek their fees and expenses for the motion to enforce.

Having determined that Plaintiff's conduct in refusing to execute the settlement was without merit, the court must now decide whether, in attempting to upset the settlement agreement, she "multiplie(d) the proceedings in (this) case unreasonably and vexatiously." 28 USC 1927. In interperting 1927, the Sixth Circuit has not required the proof of bad faith. In Jones v. Continental Corp, 789 F 2d 1225, 1230 (1985), the court held that 1927 permits the award of fees despite the absence

of conscious impropriety. In In re Ruben, 825 F2d 977 (6th Cir. 1987) the court further explicated the standard:

> "There must be some conduct on the part of the subject attorney that trial judges, applying the collective wisdom of their experience on the bench could agree falls short of the obligations owed by a member of the bar to the court and which, as a causes additional expense to the opposing additional expense to the opposing party.

825 F2d at 984

1927 authorizes the sanctioning only of attorneys. Plaintiff is an attorney at law admitted to practice before the Ohio supreme court in 1977 and a member of the bar of this court. At least from the time she refused to sing the settlement papers she has been acting on her own behalf in this case. She explicitly agreed to her trial attorney's withdrawal and to proceed pro se and has estimated the amount of legal work she did on the case prior to his withdrawal at seventy per cent or more.

Accordingly, the court concludes that she can be held personally liable under 1927.

The obligation which Plaintiff violated is also supplied by case law.

> " Agreements settling litigation are solemn undertakings, involving a duty upon the involved lawyers, as officers of the Court to make every reasonable effort to see that the agreed terms are fully and timely carried out.

Aro Corp v. Allied Witan Co., 531 F2d 1368, 1372 (6th Cir., 1976) cert denied, 429 US 862

The Court has already discussed at length in the Sept. 14 Opinion the merits of Defendants Motion to Enforce the Settlement and Plaintiff's defenses of lack of consideration, duress and rescission. Since that Opinion was filed, Plaintiff has had two additional opportunities to place before the Court her arguments as to why she should not be sanctioned for not completing the settlement. On Oct. 9, 1987, she filed a Memorandum contra

Motion for Sanctions (Doc. 126) The Court set hearing for sanctions on October 15, 1987. Although Plaintiff failed to appear, claiming she thought the hearing had been cancelled, the court was able to conduct the hearing by telephone conference call. (the transcript of the hearing is docketed at Doc. 132)

With respect to the issue of duress, Plaintiff claims in her Memorandum Contra that she expected to be given an oral hearing on this issue before the Court decided the motion to enforce the settlement. She never requested such a hearing as she admitted on October 15 (Doc 132, p 40) She was also aware of S.D. Ohio Rule 4.0.4 which provides that motions in this court are submitted without oral argument or hearing unless a hearing is ordered by the court. (Id). The court has already held in the opinion of September 14, that the motion to enforce did not require an evidentiary hearing since the terms of the settlement were recited into the record.

In any event, plaintiff was not prejudiced

by the failure to hold a hearing on her duress defense since she offered all of the testimony she would have given at such a hearing during the telephone hearing on October 15 (Doc. 132, pp 30-40)

The first element of her duress claim is that the Court and Defendants together threatened her with sanctions in excess of $80,000. During the October 15 hearing she testified how that "threat" was communicated to her by her counsel. There is no material variance between her understanding of what happened and the court's understanding of the facts. When the court suggested to Messrs. Glasper and Hoppe that settlement be discussed, Mr. Glasper asked how much the Defendants were willing to pay. Mr. Hoppe countered that they would pay nothing, but they would give up their sanctions motion (which had been pending since April, 1985) and their fraud counterclaim for releases. At that point the Court asked Mr. Hoppe how much time the Defendants had in the case as an indication of what they thought

their sanction motion was worth. It is inconceivable to the court that settlement negotiations could have proceeded without the Plaintiff having some idea of what the Defendants thought they could recover on that motion. Plaintiff has repeatedly professed her skill at negotiation and indeed offered Getting to Yes by Fisher and Ury as a trial exhibit. At the October 15 hearing she admitted that knowing the Defendant's figure was important (Doc. 132, p 52) Yet she claims to have been coerced by the revelation of the key figure relevant to the negotiation of a settlement: how much the Defendants thought they were giving up.

The second element of her duress claim is that she was concerned about her present job and explaining to her employers about being sanctioned. For the first time on October 15 she revealed to the Court and Defendants that someone had sued her department, (the Ohio Department of Agriculture) and

> won my job so my employers are currently in the position of finding

> me another position and I just found that our the week before, the Friday before I left for this trial and my head was on a chopping block as far I was concerned because they were going out for me trying to find me another job.

(doc. 132, p.31) The Court understands how this information might have made settling the case more attractive to Plaintiff, but neither the Court nor the Defendants knew about it until October, 1987, nearly ninety days after the settlement. The legal concept of duress does not include a party's state of mind based on information not known to the threatening party.

In sum, Plaintiff's defense of duress is both legally and factually frivolous. Moreover, Plaintiff made absolutely no allegation of duress or even any reference to the underlying facts supposedly supporting that claim when she stood up in open court and said that she was settling the case. Even assuming

the law would recognize a duress defense based on the kinds of facts Plaintiff has alleged, it could hardly tolerate a lawyer's agreeing in open court to a settlement without reference to such facts and then reneging. Plaintiff's position must be that she was settling , but she was also intimidated into not mentioning the fact that she was being coerced when made her settlement statement. She admitted during the October 15 hearing that she agreed to the settlement and her statement her statement of agreement was truthful at when made (Doc. 132, p 30). She was at that time an attorney with nearly ten years experience. It would make a mockery of the law to permit such a person to sandbag a court and opposing counsel into discontinuing a trial and then reneging on it later. Attorneys are required to be made of sterner stuff and to keep their work when it is given. Miss Ullmann's repudiation of the settlement based on her claim of duress is unreasonable and vexatious.

Miss Ullmann also claims the settlement

was unenforceable because Defendants inserted provision in the draft settlement agreement which had not been agreed upon in open court. She objected to third party beneficiary status for the witnesses, but that had been contemplated by the oral settlement. She also objected to a New York choice of law clause and the specific terms of the confidentiality clause.

There is certainly was no obligation on Plaintiff to give up more that she had agreed to. The court recognized this in refusing to enforce the draft provisions which went beyond what had been agreed to. But having agreed to settle the case, Miss Ullmann had an obligation to negotiate about the specific written terms in good faith. It is frequently the case, at least in this Court's experience that additional working an substance questions will arise when two lawyers, working in good faith, attempt to put together an oral understanding in writing. But Miss Ullmann did not negotiate in good faith. She took minor disagreements

over collateral matters as an excuse to repudiate the substance of the settlement. In her August 16 letter to Mr. Hoppe repudiating the settlement, she concluded:

> "I am willing to renegotiate the the only way I will voluntarily dismiss this complaint is if Judge Rice, not the magistrate, says my conduct is sanctionable, that threatening me with $80,000+ sanctions is appropriate judicial conduct on the part of the magistrate and that your firm has done nothing sanctionable.

(Ex. 5 to Doc. 111) During the October 15, hearing, she indicated that her idea of a fair cash settlement was between $22,000 and $25,000, the amount of her back wage claim against the Defendants (Doc. 132 pp 41-2, 48) Her only remaining claims at the time of trial were her Title VII claims on which her principal entitlement, if any would have been to back wages. This was after she had been given a chance to present her case and had

failed to obtain the presence of most of her listed witnesses, expert and lay. In other words, on August 16th she was demanding Defendants either pay her the full amount she could have won after a successful trial or obtain an advisory opinion of the fairness of the settlement or obtain an advisory opinion of the fairness of the settlement and the Magistrates's ethics by District Judge Rice. There is no doubt in the Court's mind that this constituted unreasonable and vexatious conduct by Miss Ullmann. The best that can be said for her behavior is that she had second thoughts after settling the case. The facts will bear the interpretation that she attempted to rescue herself form a desperate trial situation by pretending to settle with every later and again attempting to obtain money form Defendants.

The Court had previously indicated its intention to sanction Plaintiff for her allegations against the Court's law clerk, Theresa Haire. The allegations were essentially that Miss Haire one occasion during trial

"commented" on Miss Ullmann's testimony by engaging in disapproving body language (Affidavit attached to Doc. 116, par. 6) Miss Ullmann refused to withdraw the allegation (Doc. 126), but she did admit at the October 15th hearing that no one but she saw it and that it was probably unconscious behavior on Ms. Haire's part. Miss Ullmann was also unable to state the legal relevance of the conduct. The court has previously indicated no monetary sanction would be imposed for filing this allegation, principally because it evoked no necessary response from the Defendants. However, the court finds there is no warrant in law for filing such an allegation and that it was note filed for any proper purpose. Accordingly. its filing was in violation of FRCP 11 and Plaintiff is hereby reprimanded to the filing.

Having determined that Defendants had made a prima facie showing of entitlement to sanctions, the court set the hearing for October 15 "...at which time Defendants may

present evidence of their expenses reasonably incurred in enforcing the settlement agreement and Plaintiff may show cause, if cause there be. why she should not be sanctioned."(Doc. 117, p22) As previously noted, Plaintiff did not appear for the hearing, but the Court was able to conduct it by telephone. Defendants offered proof of their fees and expenses by affidavit of Gary Hoppe (Doc 130). The Affidavit was read to Miss Ullmann by the Court (doc. 132 p 7-12). She offered no opposing evidence and did not attempt to cross examine Mr. Hoppe on his affidavit. Thus the sole evidence before the Court on the amount of the fees and expenses and their reasonableness is Mr. Hoppe's Affidavit. Thus the sole evidence before the court on the amount of fees and expenses and their reasonableness is Mr. Hoppe's Affidavit.

In a recent case on the measure of fees under FRCP the Sixth Circuit held that they must be limited to the amount of "reasonable expenses" incurred as a result of the Rule 11

violation and imposed on the offended party an obligation to mitigate his damages. Invst Financial Group v. Chem-Nuclear Systems, 815 f2d 391, 404 (6th Cir. 1987). While the court did not explicitly make this ruling applicable to 1927 motions, this court can conceive of no reason why it should not be applicable. Tha language of 1927 ("excess costs, expenses and attorney's fees reasonably incurred because of such conduct") certainly parallels the language of Rule 11 and the purposes of the two rules- to punish and deter offenders and compensate the offended-- are certainly the same.

Thus the Defendant can only recover the amounts reasonably expended in enforcing the settlement, considering their duty ti mitigate their damages.

In calculating the amount which will reasonably compensate Defendants for their expenses, this court understands its obligation to be first of all to calculate the "lodestar" amount: reasonable hours times a reasonable hourly rate. See, eg. Pennsylvania v. Delaware Valley

Citizen's Council, --US --, 106 S. Ct. 3088 1986).

Mr. Hoppe's affidavit show that after August 14, 1987, when he received first work of Plaintiff's repudiation of the settlement, he expended 4.9 hours in enforcing the settlement, including telephone conference to attempt to learn what had happened, a telephone confence with the court, and the drafting of Defendant's Motion to Enforce. Miss Ullmann's only response to the number of hours was to accuse the Defendant's of padding their time and to label the amount as "excessive and ridiculous" (doc. 132 p 21) The court has no basis on which to conclude either that Defendants did not spend the time they assert or that such amount of time was not reasonable. Plaintiff could have attended the hearing and cross examined Mr. Hoppe on his affidavit or she could have cross-examined him over the telephone; she could have asked that additional substantiating records be submitted. She did not these things but choice to rely on

accusation alone. The court expressly find that the amount of time expended to be reasonable.

Defendants in this action proceeded pro se. They seek attorneys fees at the rates they would bill for the time expended to their own clients (doc. 130, par 4) Plaintiff objects that the court should instead use the rates customary in the Dayton, Ohio area for similar work. This objection is well taken, Coulter v. State of Tenn., 805 F2d 146 (6th cir. 1986)

The Court takes judicial notice that Messrs Hoppe and Machinski have been in practice of law nine and ten years respectively. Martindale-Hubbell Law Directory (1986) p. 2019 B. Attorneys with similar experience in the Dayton, Ohio area would ordinarily have billing rate of approximately $100.00 per hour and the court finds that to be a reasonable rate for the time expended here. Even though Defendants' opportunity cost of defending this action themselves may have been higher, they are only entitled to the market rate in Dayton.

Multiplying the 56.3 hours expended by the $100 rate gives a lodestar figure of $5,630. The court has not been offered any justification for modification of that figure and finds it will fairly compensate Defendants for the amount of time reasonably expended in enforcing the settlement.

Defendants have also proven expenses associated with the enforcement motion of $935.69 (Hoppe Affidavit, Doc. 130, Pars. 5 and 7) The Court finds that those expenses were reasonably incurred as a result of Miss Ullmann's conduct in attempting to enforce the settlement.

Defendants are hereby awarded sanctions under 28 USC 1927 in the amount of $6,565.69 for which amount judgment shall enter in their favor and against the Plaintiff.

11/2/87

/s/

Michael Merz

UNITED STATES MAGISTRATE

No 87-3945 and 87-4077

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Victoria E. Ullmann

Plaintiff-Appellant

vs.

On Appeal From the United States District Court Southern District of Ohio Western Division

Olwine, Connelly Chase, O'Donnell and Wehyer

Before: Engel; Chief circuit Judge; Milburn, Circuit Judge and Dowd, District Judge, (Honorable David D. Dowd, Jr. United States District Court for the Northern District of Ohio, sitting by Designation.

PER CURIAM. Victoria Ullmann appeals from tow judgements entered in the United States District Court for the Southern district of Ohio, Western division. The first judgement granted the motion of defendants Olwine,

Connelly, Chase, O'Donnell and Weyher ("Olwine") and Job Taylor III, to enforce the parties settlement agreement in a Title VII sexual harassment case. The second judgment awarded defendants costs and attorneys fess pursuant to 28 USC 1927, but limited Ullmann's oppostion to defendabt's opposition to defendant's motion to enforce the settlement agreement.

Ullmann, an Attorney was hired by Olwine in February of 1984 to assist in a production of documents in Dayton, Ohio that Olwine was conducting on behalf of a client. Olwine's activities in Dayton were co-ordinated by Taylor, a partner in the firm. Approximately one month after she began work for Olwine,Taylor informed her that she was discharged.

Ullmann filed a charge with the Ohio civil Rights commission in September, 1984. She later withdrew her charge and obtained a right to sue letter. She instituted the present action in district court on March 14, 1985,

alleging both sexual harassment and contractual violations. Olwine and Taylor responded by filing a motion for summary judgement. In August of 1986, the parties consented to full magistrate jurisdiction and the case was referred to Magistrate Michael Merz for all purposes.

On January 23, 1987 the court granted defendants' summary judgement motion as to the contractual claims and all but two of the sexual harassment claims which proceeded to trial on July 27, 1987. As Ullmann neared the completion of her case on the morning of July 28, 1987, settlement discussions, at the urging of the magistrate began at noon. The parties, through counsel, announced the settlement in open court at 3:00 July 28, 1987, under which Ullmann agreed to withdraw her claims and the defendants agreed to withdraw their counterclaim for fraud and their motion for sanctions.

The plaintiff, as part of the settlement agreement, offered the following statement:

"Ms. Ullmann: I just wish to made a statement as to why I have chosen to settle this case. My belief in my case remains steadfast. i do not believe there are ay bases for any rule 11 sanctions in this case, however, with the case from the Sixth cir. foing up to the Supreme court to set forth the ramification of the proper situation in which Rule 11 sanctions will be applied I do not feel, it seems that there might end up being more litigation on the Rule 11 sanctions than on the issues that made a difference to me. Also--I'm sorry

The Court: Take a second if you wish

Ms. Ullmann I'm emotional and this has been with me until today and I would like that to end

The goals that I wish to accomplish have largely been accomplished. I feel that by continuing to litigate it I will not particularly assist anyone with similar problems, however, by pursing publication within the ramifications of the agreement with

Defendant I believe that there will be more benefit provided to both myself and anyone else that wishes to litigate in this area and concerning the low amount of wages that is actually at stake in this matter, it seems that it has reached a point of diminishing returns as far as I am concerned.

Counsel for the defendants and submitted settlement papers and releases to counsel for Ullmann. Counsel gave his approval to the documents and forwarded them to Ullmann for approval. She refused to sign. She carried on correspondence with counsel for the defendants explaining her refusal and declared:

I am willing to renegotiate the settlement. The only way I will voluntarily dismiss this complaint without a cash settlement is if Judge Rice, not the magistrate says that my conduct was sanctionable, that threatening me with $80,000 of sanctions is appropriate judicial conduct on the part of the magistrate and that your firm has done nothing sanctionable. we can make a joint

motion to him to consider our individual Rule 11 motions. As I have indicated, I will be making my own motions if no joint motion is made. Of course I am always willing to explore other alternatives.

After a conference on august 24, 1987, at which Ullmann reinterated her refusal to comply with the settlement agreement, defendants moved to enforce the settlement and to obtain sanctions against Ullmann. On September 14, 1987 Mag. Merz ordered Ullmann to comply with the terms of the settlement agreement. Further, on November 24, 1924, he imposed sanctions of $6, 565.69 against Ullmann, an amount he determined to be equal to the amount reasonably expended by defendants in enforcing the settlement agreement.

On appeal, Ullmann challenges the judgment enforcing the settlement agreement claiming that Magistrate Merz erred:

1. In failing to recuse himself.

2. In abusing his discretion by indicating during trial that he would levy sanctions against the plaintiff.

3. In reprimanding the plaintiff regarding her misconduct claim directed to the Magisrate's law clerk.

4. In enforcing the settlement agreement.

Additionally, Ullmann challenges the award of sanctions in the sum of $6,565.69 against her for her refusal to approve the settlement agreement.

We turn first to the issues raised with respect to the September 14, 1987 judgment enforcing the terms of the settlement agreement.

Magistrate Merz responded to the motion to enforce the settlement agreement with a twenty-five page opinion containing a detailed examination and rejection of Ullmann's arguments in opposition to the defendants' motion to enforce the settlement agreement. Specifically, the Magistrate rejected Ullmann's claim that the settlement agreement was void because her assent was induced by duress, that is a threat by the Magistrate to impose sanctions. The Magistrate emphatically denied

such conduct, but did find consideration for the settlement agreement in the defendants' forbearance of its claim for sanctions bases upon its position that Ullmann's action was frivolous. Magistrate Merz also rejected Ullmann's claim of recission, but did honor Ullmann's position that certain terms included by defendant's counsel in the draft settlement agreement were not agreed upon in court. Consequently, the parties were held to the settlement terms as recited in open court.

Ullmann's claim for post-trial sanctions was denied. The defendant;s motion for post-settlement sanctions was granted and a hearing was conducted on Oct. 15, 1987 at which time the defendants were permitted to present evidence of their expenses reasonably incurred in enforcing the settlement agreement and the plaintiff was given an opportunity to show cause why she should not be sanctioned. Finally, the plaintiff was directed to purge herself of a rule 11 sanction sua sponte imposed by the magistrate for the plaintiff's

personal attack upon the Magistrate's law clerk in an affidavit submitted by the plaintiff wherein she asserted:

"I saw Thereas Haire, the magistrate's clerk, squeeze up her nose, wiggle her shoulders and repeat silently testimony I had just given."

Summary enforcement of a settlement agreement for which there is no dispute as to the terms of the agreement is the only appropriate judicial response, absent proof of fraud or duress. EG. Aro Corp v. Allied Witan, 531 F2d 1368, 1372 (6th cir), cert den, 429 US 862f (1976); Kukla v. National Distillers products co., 483 F2d 619, 621 (6th Cir. 1973) The court has inherent power to enforce agreement of settlement, Bostick Foundry Co. v. lindberg, 797 F2d 280 (6th Cir.) cert den. US 107 S Ct. 1987; Bowater North America Corp v. Murray , 773 F2d 71 (6th Cir. 1985). title VII claims are subject to dismissal where there has been a voluntary and knowing settlement. Alexander v. Gardner-Denver Co., 415 US 36, 52 note 15 (1974)

"Those who employ the judicial appellate process to attack a settlement through which controversy has been set to rest bear a properly heavy burden." Asberry v. United States Postal Service, 692 F2d 1378, 1380 (fed. Cir. 1982).

Ullmann advances the argument that the settlement should not have been enforced because her underlying claim of sexual harassment was meritorious and defendants' counterclaim for sanctions was without merit. To set aside a settlement agreement on that basis would negate any settlement where the parties agreed to forego their respective claims. Ullmann's contention that she settled out of fear of losing the counterclaim is equally without merit.

Ullmann's claim that the settlement agreement should not have been enforced because duress imposed by the Magistrate's threat to impose sanctions if plaintiff failed to settle the case merits discussion. Ullmann made no reference to such a threat when she addressed

the court on July 28, 1987 and stated her reasons for agreeing to the settlement. Mag. Merz specifically denied having made such a threat. Magistrate Merz specifically denied having made such a threat in his opinion ordering enforcement of the settlement agreement as he stated

Plaintiff asserts the settlement agreement is void because her assent was induced by duress, to wit, the threat of sanctions. A distinction must be drawn between two kinds of threats which are not clearly distinguished in Plaintiff's Memorandum.

A threat by a judge to impose sanctions unless a party settled at case might well be duress sufficient to void a settlement. Factually nothing of that sort happened in this case. The Magistrate never spoke personally with the Plaintiff about sanctions, nor did he tell her counsel that he would impose sanctions if she refused Defendants' offer. She concedes as much by not contending there was any personal conversation or indirect threat

through her counsel. Instead she says: Even if the court did not intend to indicate that plaintiff would be sanctioned, the magistrate's comments and attitude created that impression. (Doc 116 p.8)

Plaintiff's notion of a threat of sanctions from the Court is, by her own admission, a product of her inference from the circumstances or her imagination. She gives no indication which of the Court's comments or manifestations of attitude created this "impression." Furthermore, this inference is all post hoc. When called upon in open court to comment on the settlement and indicate if she assented, Plaintiff, an attorney admitted to practice for nearly ten years, made absolutely no suggestion that the Court had threatened her.

Our review of the record lead to the conclusion that Ullmann has failed to meet the heavy burden of demonstrating that her assent to the settlement agreement was procured by either fraud or duress.

Ullmann also contends that the settlement agreement should be set aside because Magistrate Merz erred in failing to recuse himself prior to trial and subsequently in sua sponte sanctioning her for her affidavit criticizing the conduct of the Magistrate's law clerk. The claim that MAgistrate Merz should have recused himself is wholly without merit.

Finally the fact that the Magistrate sua sponte inposed a Rule 11 sanction of apology upon the plaintiff for her derogatory comments about the Magistrate's law clerk, whether correctly decided of not, has no bearing upon the judgement enforcing the settlment agreement and consequently, we do not consider further plaintiff claim.

For the foregoing reasons, the judgement enforcing the settlement agreement is affirmed

The second appeal attacks the granting of sanctions pursuant to provisions of 28 USC 1927. Ullmann's objection to the award of sanctions is limited to a declaration that the settlement agreement should not have been enforced and thus

sanctions are not justified. No claim is advanced that the amount for the sanctions is excessive of that the computation is erroneous. Prior to awarding sanctions, the Magistrate conducted a hearing on October 15, 1987. Ullmann failed to appear for the hearing, but the Magistrate, upon determing that Ullmann had misunderstood the order, permitted her to participate in the hearing by telephone. After the hearing, the Magistrate published a twelve page opinion with findings of facts and conclusions of law none of which plaintiff attacks other than to contend that sanctions were inappropriate. Defendants' counsel sought sanctions based upon hourly rates of $220 and $180 per hour for the two lawyers involved in the process of enforcing the settlement. The magistrate reduced the allowable fees to $100.00 per hour and computed the sanction on that basis. We find the imposition of sanctions pursuant to 28 USC 1927 to be proper and judgement is affirmed.

In their brief the Defendant-appellees seek their reasonable attorney's fees plus double cost pursuant to Fed. R. App. 38, 28 USC 1912 and 28 USC 1927 and request remand to the district court to determin the amount of fees and costs involved. Having considered the request, the same is denied.

the judgements appealed in case number 87-3945 and n87-4077 are each affirmed

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

VICTORIA E. ULLMANN	JUDGEMENT IN A
V.	CIVIL CASE
OLWINE, CONNELLY, CHASE O'DONNELL AND WEYHER	C-3-85-233

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that not later than October 1, 1987, Plaintiff Victoria E. Ullmann shall execute and deliver to the Court general releases in the form attached to Document #111 releasing Defendant Olwine, Connelly, Chase O'Donnell and Weyher, Defendant Job Taylor, and each of the non-parties International Business Machine Corp, Frieda Brigner, Susan C. Gingerich, Karen A. Oswalt, Barbara Shook and Tai Agbomeirele:

that not later than October 1, 1987, Defendants, Olwine, Connelly Chase, O'Donnell

and Weyher shall execute and deliver to the court general releases of Plaintiff Victoria E. Ullmann;

That the parties are ordered to keep the facts of this case confidential, provided that if Defendants or either of them is compelled by judicial process to testify concerning the facts of this case, the compelled party shall give seasonable notice of the service of such process by certified mail to Plaintiff at 2658-F Old Forge Road, Cols, Ohio

That judgement is entered in favor of the Def. Olwine, Connelly, Chase o'donnell and Weyher, and Job Taylor and against Plaintiff victoria E. ullmann and

that the Complaintf and the Counterclaim are dismissed with prejudice and that each party bear its own costs.

September 14, 1987

Kenneth J. Murphy

Clerk

/s/

Karla S. Ervin

Deputy Clerk

No 87-3945 87-4077

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

VICTORIA E. ULLMANN

V.

OLWINE, CONNELLY CHASE, O'DONNELL AND WEYHER, A Partnership containing a corporation, et al

ORDER

BEFORE: ENGEL, Chief Judge, MILBURN, Circuit Judge, and Dowd, United States District Judge (sitting by designation)

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel member but also to all other active judges of this Court, and no judge of this court having requested a vote on the suggestions for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the

petition for rehearing and concludes that the issues considered in the original submission and decision of the case. According the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green, Clerk

STATUTES CITED

28 USC 455

Disqualification of justice, judge or magistrate

(a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be question.

(b) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding...

****

(d) For the purpose of this section the words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review or other stages of litigation...

28 USC 1927

Counsel's liability for excess costs

Any attorney or other person admitted to conduct cases in any court of the United States

or any Territory thereof who so multiplies the proceedings unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct.

28 USC 2072

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, motions and the practice and procedure of the district courts courts of appeals of the United States in civil actions, including admirality and maritime cases, and appeals therein, and the practice and procedure in appeals of decisions of the Tax Court of the United States and for the judicial review by the Courts of the United States and for the judicial review or enforcement of orders of administrative agencies, broads, commissions and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of jury trial as declared by the Seventh Amendment to the Constitution.

****

42 USC 2000e 2 (a)(1)

[I]t shall be an unlawful employment practice for an employer ...to discharge any individual or otherwise to discriminate against any individual with repect to...terms, conditions or privileges of employment because of such individuals..sex.

42 USC 2000e-3(a)

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment..to discriminate against any individual..because her opposed any practice made unlawful employment practice by this subchapter, because he had made a charge, testifies asserted or participated in any manner in an investigation, proceeding or hearing under this subchapter.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 11

Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statue, pleading need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, motion or other paper; that to the best of the signers's knowledge, information and belief, and formed after reasonable inquiry it is well grounded in fact

and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. and that it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation. IF the pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion or other paper is signed in violations of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading or motion or other paper, including a reasonable attorney's fee.

(2)

No. 88-1220

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

VICTORIA E. ULLMANN,

Petitioner,

v.

OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER and JOB TAYLOR III,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE CASE

Respondents Olwine, Connelly, Chase, O'Donnell & Weyher and Job Taylor III oppose the petition for a writ of certiorari in this case to review of the judgment of the United States Court of Appeals for the Sixth Circuit. There is no reason whatsoever for granting the petition. The facts of this case do not present the purported "issues" suggested by Petitioner; the petition fails to show that any of the considerations for granting certiorari set forth in Supreme Court Rule 17.1 are present; and the decision below clearly was correct and in accord with decisions of this Court and of other courts of appeals.

Petitioner attempts to make this case something it is not by taking the amazing tack of admittedly ignoring the findings of fact of both courts below completely and basing her statement of the case solely on statements "of petitioner's position" drawn from her affidavits and motion papers (*See* Petition, p. 3) – which were considered and found incredible both by the District Court and the Court of Appeals. Given Petitioner's resort to this desperate and bizarre tactic, this Court need not tarry in assessing the truthfulness or relevance of Petitioner's statement of the case.

Because of the lengthy and largely irrelevant presentation by Petitioner, Respondents will not respond to every one of the many misstatements in her description of the case. The opinions of the District Court and the Court of Appeals adequately state the underlying facts of this action and the Court is respectfully referred thereto. Respondents will quote briefly from those opinions to

show the fantasy of Petitioner's description of the action and of the "issues" she suggests would be presented for review if the petition were granted.

This case presented two and only two issues to the Court of Appeals – neither of which is of general importance and both of which the court decided correctly and in accordance with decisions of this Court and of other courts of appeals. Those questions are: (1) could the District Court enforce a settlement agreement – the terms of which were read into the record and not in dispute and which both Petitioner (herself an attorney) and her counsel expressly agreed to on the record – over Petitioner's later unfounded unilateral refusal to perform; and (2) could Petitioner be sanctioned under 28 U.S.C. § 1927 – *not* Rule 11 of the Federal Rules of Civil Procedure – to pay to Respondents the amount of "excess costs, expenses and attorney's fees reasonably incurred because of" the necessity to enforce the agreement. Both courts below determined that the agreement should be enforced and that Petitioner should reimburse Respondents for the excess expenses ($6,565.69) caused by her multiplication of the proceedings.

Petitioner's presentation of her case at trial revealed the lack of basis for her claims. Near the close of her case a settlement conference was held in the Magistrate's chambers, wherein Respondents offered to give up their counterclaim for fraud and to withdraw their motion for Rule 11 sanctions (relating to Petitioner's trial and pretrial conduct) in exchange for Petitioner's dismissing her remaining claims and executing releases. After a recess of several hours during which Petitioner herself further negotiated the settlement terms, proceedings were held

in open court where the settlement terms and Petitioner's agreement to those terms were expressly stated on the record. Petitioner was further allowed (at her insistence) to "make a statement" on the record, whereupon she in no way suggested that her assent to the settlement was involuntary but instead prided herself because of the fact that "the goals that I wish to accomplish have largely been accomplished."

Thereafter, Petitioner reneged on the agreement and refused to follow through on the settlement by dismissing her claims and providing releases unless Respondents made a sizeable cash payment to her. Respondents at that point moved to enforce the settlement agreement and for sanctions under 28 U.S.C. § 1927 in the amount of the additional legal fees and expenses occasioned by the motion. The Magistrate granted both motions and the Court of Appeals unanimously affirmed.

Petitioner's claims that the settlement was extracted through duress or "threats" by the Magistrate are completely lacking in merit. As the Court of Appeals stated in its opinion:

> "A threat by a judge to impose sanctions unless a party settled at case might well be duress sufficient to void a settlement. Factually nothing of that sort happened in this case. The Magistrate *never* spoke personally with the Plaintiff about sanctions, nor did he ever tell her counsel that he would impose sanctions if she refused Defendants' offer. She concedes as much by not contending there was any personal conversation or indirect threat through her counsel. Instead she says: Even if the court did not intend to indicate that plaintiff would be sanctioned, the magistrate's comments and attitude created that impression. (Doc 116 p.8)

> Plaintiff's notion of a threat of sanctions from the Court is, by her own admission, a product of her inference from the circumstances or her imagination. She gives no indication which of the court's comments or manifestations of attitude created this "impression." Furthermore, this inference is all *post hoc*. When called upon in open court to comment on the settlement and indicate if she assented, Plaintiff, an attorney admitted to practice for nearly ten years, made absolutely no suggestion that the Court had threatened her.
>
> Our review of the record leads to the conclusion that Ullmann has failed to meet the heavy burden of demonstrating that her assent to the settlement agreement was procured by either fraud or duress."

(Petitioner's Appendix, pp. 66-67).

Petitioner's claims that she was given no chance to be heard prior to the imposition of sanctions also is untrue. As the Court of Appeals found:

> "Prior to awarding sanctions, the Magistrate conducted a hearing on October 15, 1987. Ullmann failed to appear for the hearing, but the Magistrate, upon determining that Ullmann had misunderstood the order, permitted her to participate in the hearing by telephone. After completing the hearing, the Magistrate published a twelve page opinion with findings of facts and conclusions of law none of which the plaintiff attacks other than to contend that sanctions were inappropriate."

(Petitioner's Appendix, p. 69)

In addition to misstating the facts, Petitioner also miscasts the reasoning of the District Court and the Court of Appeals in an apparent attempt to create the "issues" she presents or to find some basis – however untruthful – for suggesting that the rulings are erroneous or are in

conflict with other decisions. While she claims that the lynchpin of the Magistrate's opinion was a finding that Respondent's Rule 11 motion was a "counterclaim," or that its withdrawal furnished the only consideration for the settlement, in fact the Magistrate's finding was that "by itself, Defendants' release of their Counterclaim for fraud would have been sufficient consideration to support their settlement agreement" (Petitioner's Appendix, p. 15), and neither the Magistrate nor the Court of Appeals reasoned that the rule 11 motion ever was or could be a counterclaim.

Similarly, Petitioner's statement that both courts below somehow reasoned that there was no duress only because threats were made not directly to her but to her attorney has no basis and is expressly belied by a reading of the courts' opinions, which contain no such reasoning in dismissing Petitioner's contentions of duress.

In sum, Petitioner's attempt to ignore the record and the opinions below and to attempt to create error or conflicts out of whole cloth only points out the futility of her petition. This case in no way merits the Court's time or interest, and the Petition should be denied.

REASONS WHY THE PETITION SHOULD BE DENIED

Throughout her lengthy petition, Petitioner never once refers to any of this Court's stated reasons for granting certiorari as set forth in Supreme Court Rule 17.1, and with good reason – no such considerations exist.

POINT I

CONTRARY TO PETITIONER'S CONTENTION, THIS CASE PRESENTS NO ISSUE CONCERNING THE "PURPOSE" OR USE OF RULE 11, OR OF THE JURISDICTIONAL NATURE OF THAT RULE

Despite Petitioner's repeated recitation of Rule 11 and the "philosophy" underlying it, no issue as to Rule 11 is presented here. Petitioner was not sanctioned under Rule 11, but rather under 28 U.S.C. § 1927 for the express reasons set forth therein (for "so multiply[ing] the proceedings . . . unreasonably and vexatiously") and the amount of the sanction was computed by the express formula set forth therein (the ~~sum~~ of Respondents' "excess costs, expenses and attorneys fees reasonably incurred because of such conduct").

No question concerning Respondents' original motion under Rule 11 (which was withdrawn as part of the settlement agreement) is preserved for review or could be presented to this Court. Therefore, Petitioner's entire discussion of the purpose of Rule 11 and whether it was or could be used a "strategic tool", or whether its use constitutes "retaliation", is irrelevant. In view of the finding of the courts below that Respondent's withdrawal of their fraud counterclaim by itself was sufficient consideration for the settlement, Petitioner's argument concerning whether the withdrawal of a Rule 11 motion could be consideration also is irrelevant as that issue is not presented for review.

Petitioner's suggestion that the decision below somehow conflicts with *Port Drum Co. v. Umphrey*, 852 F.2d 148 (5th Cir. 1988), is without basis. The issue presented in that case was whether a non-party's motion under Rule

11 was by itself an independent basis for Federal question jurisdiction, and the court ruled that Rule 11 was not an independent grant of jurisdiction and upheld the lower court's dismissal on jurisdictional grounds. There is no similar question presented here and accordingly no conflict – either direct or indirect – is present.

POINT II

NO ISSUE CONCERNING THE VOLUNTARINESS OF PETITIONER'S AGREEMENT TO THE SETTLEMENT MERITS REVIEW

No issue concerning the voluntariness of Petitioner's agreement to the settlement merits review, and the holding below does not conflict with the decisions of this Court or of any court of appeals. Petitioner's continued protestation that the settlement was invalid within the framework of *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), was adequately addressed and disposed of in the opinions below.

Petitioner, an experienced attorney, expressly assented to the terms of the settlement in open court and made no suggestion that her agreement was involuntary or exacted by any threat, and both courts below found that no threat was made. Petitioner's subsequent repudiation of the settlement agreement was, as the courts below found, the product either of a simple change of mind or of a deliberate attempt to "sandbag" the court and Respondents in order to extricate herself from the disastrous presentation of her case at trial. Neither of

these is a proper reason for finding that her earlier agreement to settle was anything other than valid and binding.*

The opinions of the courts below enforcing the agreement are in no way inconsistent with *Alexander* or with decisions of other courts of appeal on this issue. *See, e.g., Fulgence v. J. Ray McDermott & Co.*, 662 F.2d 1207 (5th Cir. 1981); *Glass v. Rock Island Refining Corp.*, 788 F.2d 450 (7th Cir 1986); *Worthy v. McKesson Corp.*, 756 F.2d 1370 (8th Cir. 1985). The offhand suggestion by Petitioner that the decision below conflicts with *Kothe v. Smith*, 771 F.2d 667 (2d Cir. 1985) is baseless. In *Kothe* the district judge was found to have abused his discretion under Rule 16(f) of the Federal Rules of Civil Procedure by expressly threatening during pretrial proceedings to sanction a party if the party did not agree to settle for a certain amount in advance of trial and later doing just that after trial. Any thought of a conflict with *Kothe* is as imaginary as Petitioner's contentions concerning "threats" were found to be.

The decision below also undoubtedly is correct. As the District Court reasoned:

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*Petitioner's inference that this case is "similar in part" to *Hopkins v. Price Waterhouse*, 825 F.2d 458 (D.C. Cir. 1987), *cert. granted*, ___ U.S. ___, 108 S.Ct. 1106 (1988) is simply another incorrect and futile attempt to create some interest in this case and should be disregarded. First, the facts and issues of this case, which concerns the enforcement of a settlement agreement, do not present any issues for review concerning Petitioner's antecedent claims. *Bostick Foundry Co. v. Lindberg*, 797 F.2d 280, 283 (6th Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 953 (1987). Second, in any event the underlying claims made by Petitioner bear no relation to the facts of *Hopkins*.

> "Plaintiff is an experienced attorney. She agreed on the record in open court without any protest of conditions to quite explicit terms of settlement. If she is permitted to repudiate this settlement on grounds it was involuntary, then it is hard to imagine any settlement agreement which would be enforceable."

(Petitioner's Appendix, pp. 23-24).

In sum, there are no reasons presented in the petition for why review is warranted with respect to these issues.

POINT III

NO QUESTION CONCERNING CONFLICT OF INTEREST OR RECUSAL MERITS REVIEW

Petitioner's "throwaway" arguments that this Court should consider whether her attorney had a conflict of interest or whether the Magistrate should have recused himself from determining whether to sanction her furnish no reason for granting the writ.

The contention that it was a conflict of interest for her attorney to be involved in the negotiation of the settlement was neither made nor preserved below, and therefore should not be considered here. In any event, the record is replete with proof (including Petitioner's own admissions) that she – an experienced attorney – was actively involved in the settlement decision, and she has posited no basis as to why this case presents any issue in this regard meriting review.

Petitioner's particular argument that the Magistrate should not have presided over the sanctions motion after deciding the motion to enforce the settlement agreement also was not presented or preserved below. Her blunderbuss application to have the Magistrate recused on other

grounds was duly considered and rejected. The suggestion that the decision below somehow is in conflict with *In re Yagman*, 796 F.2d 1165 (9th Cir. 1986), *cert. denied*, ___ U.S. ___, 108 S.Ct. 450 (1987), is without merit. In *Yagman* the decision to refer the question of sanctions to another judge on remand was based on a finding that the trial judge's belated award of sanctions served no purpose and was in an amount ($250,000) found to be so "massive" and "grossly disproportionate" to the attorney's conduct as to border on a fine for criminal contempt. No such findings were made, or could be made, in this case.

POINT IV

NO QUESTION CONCERNING THE AWARD OF SANCTIONS UNDER 28 U.S.C. § 1927 MERITS REVIEW

Petitioner's final alleged "question presented" is whether 28 U.S.C. § 1927 authorizes an award of attorney's fees against an attorney who "makes arguments of first impression, based both in fact and law, consideration of which lengthens or complicates the court proceedings?" That question certainly is not presented here. As aptly described by the court below, Petitioner's vexatious conduct was based not in fact and law, but only in her own imagination and desire to prolong the litigation, and the arguments she made are hardly of "first impression" or of general interest. This Court has routinely declined to review instances where settlement agreements were enforced against attorneys who entered into the agreements and later reneged on them, *See, e.g., Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir.) (*en banc*), *cert. denied*, ___ U.S. ___, 107 S. Ct. 178 (1986); *Aro*

Corp. v. Allied Witan Co., 531 F.2d 1368 (6th Cir.), *cert. denied*, 429 U.S. 862 (1976), and there is no reason to do so here. Petitioner's conduct herein was so unprofessional and egregious that, thankfully, it does not present any issue of general interest which this Court need address.

CONCLUSION

For the reasons stated above, we ask that the petition for a writ of certiorari be denied.

Respectfully submitted,

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